

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application for Review of Decision of)	CC Docket No. 02-6
The Schools and Libraries Division)	
Of the Universal Service Administrative)	
Company)	
)	
Appeal of Disbursed Funds Recovery Letters)	
Funding Year: 1999-2000)	
Form 471 Application Number: 147340)	
Applicant: Indianola Indep. School Dist. 25)	

**REQUEST FOR REVIEW AND/OR WAIVER BY
SOUTHWESTERN BELL TELEPHONE COMPANY**

Southwestern Bell Telephone Company (“SWBT”) hereby appeals the June 1, 2004, Disbursed Funds Recovery Letter from the Universal Service Administrative Company (USAC) to SWBT. *See* Letter of USAC to E-Rate Service Center, SWBT, attached hereto as Exhibit 1. In that letter, USAC states that it is seeking recovery of funds for telecommunications services delivered by SWBT to Indianola Independent School District 25 (the “Applicant”) during funding year 1999-2000 on the ground that the applicant did not pay their non-discounted share for the services provided.¹

To be sure, the Applicant in this case submitted its request for reimbursement from USAC using the BEAR process before paying its non-discounted share for the services provided – indeed, the Applicant, which no longer receives services from SWBT, never paid its non-discounted share, which SWBT therefore has been forced to write off as bad debt. However, there is no suggestion that SWBT is responsible in any way for the Applicant’s failure to comply with the e-rate rules, nor is there any claim that SWBT should have questioned the Applicant’s certifications on the BEAR form and policed its compliance with the e-rate rules. As discussed

¹ *See* Exhibit 1 at 5.

below, when an applicant uses the BEAR process, it is responsible for properly invoicing USAC, and SWBT relies on the applicant's certification that it has done so; the service provider merely certifies that it promptly will remit back to the applicant any reimbursement funds disbursed by USAC. Yet, under existing procedures, USAC seeks to recover funds erroneously disbursed only from service providers, regardless of whether the service provider was responsible for the disbursement or could have done anything to prevent the error. These procedures are inequitable and inefficient, and undermine service providers' incentives to participate in e-rate projects. For these reasons, SWBT has urged the Commission to develop new COMAD procedures that focus on the party or parties that are responsible for, or benefited from, e-rate funds, and thus promote accountability and incentives for all parties to comply with e-rate rules.² In the meantime, where, as here, a service provider already has disbursed e-rate funds to the applicant, and is in not responsible for the erroneous disbursement of funds, the Commission should, to the extent necessary, waive existing procedures, and instruct USAC to seek reimbursement directly from the applicant.

I. BACKGROUND

On June 1, 2004, USAC sent SWBT a Disbursed Funds Recovery Letter, notifying SWBT that USAC was seeking recovery of \$1,835.40 in e-rate funding committed to the Applicant pursuant to FRN 242023 due to non-compliance with the e-rate rules.³ USAC's sole explanation for seeking recovery was:

After a thorough investigation, it has been determined that \$1,835.40 was erroneously disbursed. During an audit, it was noted that the applicant did not pay their non-discounted share for the services provided. As this is a violation of the rules of the Schools and Libraries Division Support Mechanism, the SLD must recover the disbursed funds.⁴

² Comments of SBC Communications Inc., CC Docket No. 02-6 (filed Mar. 11, 2004) (SBC Comments). SWBT is a wholly owned subsidiary of SBC.

³ See Exhibit 1 at 5.

⁴ *Id.*

In this case, the Applicant sought reimbursement from USAC for telecommunications services provided by SWBT using the BEAR process.

II. DISCUSSION

The Commission should direct USAC to seek such recovery of the erroneously disbursed funds directly from the Applicant and, to the extent necessary, waive any procedures that might provide for recovery of such funds from SWBT. In 1999, the Commission first required USAC to adjust commitments for e-rate funding disbursed in violation of the 1996 Act, and directed it to develop a plan for recovering funding improperly or erroneously disbursed.⁵ In a companion order, the Commission waived recovery of funds disbursed or committed in violation of four Commission rules on the ground that affected applicants or service providers may have reasonably relied on the funding commitments by USAC.⁶ The following year, the Commission approved USAC's recovery plan, which generally provided for USAC to recover improperly disbursed e-rate funds from service providers, rather than applicants.⁷ The Commission justified seeking recovery from service providers solely on the ground that "service providers actually receive disbursements of funds from the universal service support mechanism."⁸ But, even then, the Commission acknowledged that these general procedures (*i.e.*, recovering funds from service providers) would not necessarily apply in all cases, "emphasiz[ing]" that these procedures would not apply in cases where the applicant "has engaged in waste, fraud, or abuse."⁹

⁵ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, FCC 99-291 (rel. Oct. 8, 1999) (*Comad Order*).

⁶ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, 15 FCC Rcd 7197, para. 7 (1999) (*Waiver Order*).

⁷ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, 15 FCC Rcd 22975 (2000) (*Comad Implementation Order*).

⁸ *Id.* at para. 8. The Commission stated that, in cases of applicant error, it expected service providers to recover from applicants any funds recovered from the service provider by USAC.

⁹ *Id.* at para. 13.

Application of the general Disbursed Funds Recovery procedures where, as here, service providers have complied with the e-rate rules exalts form over substance; is inequitable and inefficient; undermines incentives for Applicants to comply with the rules; and would discourage participation in the program. First, the mere fact that service providers, rather than applicants, “actually receive disbursement of funds” is irrelevant. Regardless of whom funds are “actually disbursed” to, it is the applicant, not service providers, to which e-rate funds are committed and which receives the benefits of such funds. Even if funds are disbursed to a service provider, the service provider cannot retain them, but rather must pass them through to the applicant through reimbursements or discounts. Service providers thus are merely conduits for the delivery of funds to the applicant. As such, it is the applicant, not a service provider, that owes a debt to the United States if funds are erroneously disbursed (except where a service provider itself has failed to comply with the e-rate rules). USAC therefore should seek recovery of such funds (either through demand or referral to the Justice Department) directly from the applicant where, as here, such funds were improperly disbursed due to applicant error.

Second, requiring SWBT to repay USAC for the disbursed funds in this context would be inefficient and patently inequitable. USAC does not assert, nor could it, that SWBT should have prevented the Applicant from submitting the BEAR form for reimbursement without paying its non-discounted share for the services provided. When an applicant uses the BEAR process for reimbursement, it is solely responsible for invoicing USAC. The service provider is required only to certify that it promptly will remit back to the applicant any reimbursement funds disbursed by USAC. The service provider does not review the applicant’s BEAR form prior to its submission, and thus is in no position to police the applicant’s compliance with the BEAR rules. As a consequence, there was no way that SWBT could have prevented the erroneous disbursement of funds to the Applicant, and once the funds were disbursed, SWBT was obligated to remit them to the Applicant.

Requiring SWBT to repay the erroneously disbursed funds would force it either to try to recover the funds from the Applicant or absorb the loss. In light of the facts that the Applicant ignored SWBT's bills and never paid their non-discounted share (which SWBT has been forced to write off), and is no longer a customer of SWBT, it is virtually inconceivable that SWBT will be able to recover from the Applicant. Either way, recovery from SWBT will increase costs for all concerned, and unfairly punish SWBT (which reasonably relied on the Applicant's certifications of compliance with e-rate requirements) for the acts of the Applicant. And, if SWBT cannot recover the funds from the Applicant, the Applicant will receive a windfall to which it was not entitled.

Third, seeking reimbursement from SWBT also would fail to provide proper incentives for the Applicant, and other applicants, to ensure that they have complied fully with e-rate program requirements. As noted above, requiring SWBT to refund e-rate monies improperly disbursed due to applicant error would force SWBT to seek recovery from the applicant. But obtaining such recovery from an applicant often has proven difficult because a service provider's only recourse, if an applicant fails to reimburse the provider for such funds, is to threaten to cut off service, which, of course, is not an option here because the Applicant no longer receives service from SWBT. Only by seeking refunds directly from applicants, and denying future e-rate funding if an applicant fails to repay improperly disbursed funds, will the Commission provide appropriate incentives for all program participants to comply with the rules.

Finally, requiring service providers to repay e-rate funds where, as here, the applicant has failed to comply with the e-rate rules will reduce service providers' incentives to bid on e-rate projects, which, in turn, will reduce competition for e-rate contracts. In the end, both consumers and applicants will suffer as e-rate costs increase and e-rate funding (which is capped) fails to be used as productively as it otherwise would.

III. CONCLUSION

For the foregoing reasons, the Commission should waive recovery of disbursed funds altogether. But, if the Commission nevertheless deems recovery appropriate in this case, it should (to the extent necessary) waive existing procedures and direct USAC to recover funds directly from the Applicant.

Respectfully submitted,

/s/ Christopher M. Heimann

CHRISTOPHER M. HEIMANN
GARY L. PHILLIPS
PAUL K. MANCINI

Counsel for Southwestern Bell Telephone Company

1401 Eye Street, N.W., Suite 400
Washington, D.C. 20005
202-326-8909 – Voice
202-326-8745 – Facsimile

July 29, 2004

Exhibit 1



Universal Service Administrative Company
Schools & Libraries Division

RECOVERY OF ERRONEOUSLY DISBURSED FUNDS

June 1, 2004

E-Rate Service Center
Southwestern Bell Telephone Company
406 North Carancahua, Room 450
Corpus Christi, TX 78401

Re:

Funding Year 1999 -2000
Form 471 Application Number: 147340
Applicant Name INDIANOLA INDEP SCHOOL DIST 25
Contact Person: CHRIS WEBBER
Contact Phone: 918-743-6161

Dear Service Provider Contact:

Reviews of Schools and Libraries Program disbursements occasionally reveal that funds were disbursed in error. Such discoveries may arise out of our periodic audits, attempts by applicants to reduce a funding commitment below the amount already disbursed, or other investigations resulting from our program compliance procedures. For example, funds may be disbursed in error when:

- Services were billed but were not delivered
- Services were billed in excess of the services delivered
- Services were returned but an appropriate refund to SLD was not made

The SLD has determined that the funds detailed on the attached FUNDING DISBURSEMENT SYNOPSIS were disbursed in error. This synopsis includes the specific funding requests, amounts, and reasons for recovery by Funding Request Number (FRN). The SLD must now recover the amount that was disbursed in error.

FUNDING DISBURSEMENT SYNOPSIS

On the pages following this letter, we have provided a Funding Disbursement Synopsis for the Form 471 application cited above. The enclosed report includes a list of the FRNs from this application for which recovery of erroneously disbursed funds is necessary. Immediately preceding the Funding Disbursement Report, you will find a guide that defines each line of the Report. The SLD is also sending this information to the applicant named above.

TO APPEAL THIS DECISION

If you wish to appeal the decision indicated in this letter, your appeal must be **RECEIVED BY THE SCHOOLS AND LIBRARIES DIVISION (SLD) WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER**. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify which Recovery Of Erroneously Disbursed Funds you are appealing. Indicate the funding request number and date of the Disbursed Funds Recovery letter. Your letter of appeal must also include the applicant name, the Form 471 Application Number, and the Billed Entity Number from the top of your letter.
3. When explaining your appeal, include the precise language or text that is at the heart of your appeal. By pointing us to the exact words that give rise to your appeal, the SLD will be able to more readily understand and respond appropriately to your appeal. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125 - Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by calling the Client Service Bureau. We encourage the use of either the e-mail or fax filing options to expedite filing your appeal.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be **RECEIVED BY THE FCC WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER**. Failure to meet this requirement will result in automatic dismissal of your appeal. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by calling the

Client Service Bureau. We strongly recommend that you use either the e-mail or fax filing options because of substantial delays in mail delivery to the FCC. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

**Schools and Libraries Division
Universal Service Administrative Company**

A GUIDE TO THE FUNDING DISBURSEMENT SYNOPSIS

Attached to this letter will be a report for each funding request from the application cited at the top of this letter for which a Recovery of Erroneously Disbursed Funds is required. We are providing the following definitions.

- **FUNDING REQUEST NUMBER (FRN):** A Funding Request Number is assigned by the SLD to each request in Block 5 of your Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.
- **SPIN (Service Provider Identification Number):** A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support programs.
- **SERVICE PROVIDER:** The legal name of the service provider.
- **CONTRACT NUMBER:** The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on the Form 471.
- **SERVICES ORDERED:** The type of service ordered from the service provider, as shown on Form 471.
- **SITE IDENTIFIER:** The Entity Number listed on Form 471 for "site specific" FRNs.
- **BILLING ACCOUNT NUMBER:** The account number that was established for billing purposes. This will be present only if a Billing Account Number was provided on the Form 471.
- **FUNDING COMMITMENT:** This represents the total amount of requested funding that the SLD committed to this FRN.
- **FUNDS DISBURSED TO DATE:** This represents the total funds that have been paid to you for this FRN.
- **FUNDS TO BE RECOVERED:** This represents the amount of Erroneously Funds Disbursed to Date. These erroneously disbursed funds will have to be recovered.
- **DISBURSED FUNDS RECOVERY EXPLANATION:** This entry provides a description of the reason SLD is seeking the recovery.

Funding Disbursement Synopsis for Application Number: 147340

Funding Request Number 242023 SPIN: 143004662

Service Provider: Southwestern Bell Telephone Company

Contract Number: T

Services Ordered: TELCOMM SERVICES

Site Identifier:

Billing Account Number:

Funding Commitment: \$2,770.20

Funds Disbursed to Date: \$1,835.40

Funds to be Recovered: \$1,835.40

Disbursed Funds Recovery Explanation:

After a thorough investigation, it has been determined that \$1,835.40 was erroneously disbursed. During an audit, it was noted that the applicant did not pay their non-discounted share for the services provided. As this is a violation of the rules of the Schools and Libraries Division Support Mechanism, the SLD must recover the disbursed funds.